No. 80-1022

In the Supreme Court of the United States

OCTOBER TERM, 1980

PASCO PETROLEUM CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Ford Motor Co. v. *Millhollin*, 444 U.S. 555 4

Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186 4

Udall v. *Tallman*, 380 U.S. 1 4

Statute and regulations:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751-760h 1

10 C.F.R. Parts 210 and 212 1

10 C.F.R. 210.92(d)(2)(i) 2

Miscellaneous:

Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981) 1

43 Fed. Reg. (1978):

p. 27779 3

p. 27781 2

p. 27782 2

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1. Petitioner is a reseller and retailer of certain refined petroleum products. At all times relevant to this litigation, petitioner's sales of these products were subject to price controls under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751-760h.[1] See 10 C.F.R. Parts 210 and 212. In May 1978, the Department of Energy (DOE) began an investigation of petitioner's compliance with the price control regulations. On June 27, 1978, DOE issued a data statement ("DATS") letter requesting that petitioner make

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[1]By the terms of the Act, these controls expire on September 30, 1981. See 15 U.S.C. 760g. On January 28, 1981, the President directed that "[a]ll crude oil and refined petroleum products are exempted from the price and allocation controls adopted purusant to the Emergency Petroleum Allocation Act" and that "[t]he Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order." Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981).

available for inspection certain records pertinent to the investigation. Petitioner received the letter on June 29, 1978. After petitioner declined to comply with the DATS request, DOE issued an administrative subpoena. Thereafter, petitioner unsuccessfully pursued its remedies within the agency (Pet. App. A2-A3, A11-A12).

When petitioner adhered to its refusal to produce the requested documents, the government commenced this action to enforce the subpoena in the United States District Court for the District of Arizona (Pet. App. A3, A12). The district court granted enforcement and ordered petitioner to comply with the subpoena (*id.* at A9-A10). On petitioner's appeal, the Temporary Emergency Court of Appeals (TECA) affirmed the judgment of the district court (*id.* at A1-A8, A18).

2. Petitioner does not challenge TECA's conclusions that "[t]he subpoena * * * was issued in aid of a DOE investigation to determine [petitioner's] compliance with the reseller pricing regulations, [which is] clearly a lawfully authorized purpose," and that "the subpoena seeks information relevant to the agency investigation" (Pet. App. A7). Rather, it contends that the subpoena was issued in violation of DOE's "Statement of Policy Regarding Audits Begun After June 30, 1978" (43 Fed. Reg. 27782 (1978); Pet. 2-3) and is therefore unenforceable. This contention is without merit, and further review is unwarranted.

On its face, the DOE statement of policy is expressly limited to "audits begun after June 30, 1978" (43 Fed. Reg. 27782 (1978); Pet. 2). Here, the DATS letter was sent to petitioner on June 27, 1978, and was received by petitioner on June 29, 1978. Thus, as TECA found (Pet. App. A6), "[t]he record in this case reflects that DOE had commenced the * * * audit [of petitioner] prior to the effective date of the DOE reseller audit policy, July 1, 1978." See also 43 Fed. Reg. 27781 (1978), 10 C.F.R. 210.92(d)(2)(i) ("[a]n

audit of a firm * * * shall be deemed to have begun with the mailing of a data statement (DATS) letter"). Accordingly, since the audit of petitioner was begun prior to July 1, 1978, DOE's statement of policy "is no bar to enforcement of the subpoena" (Pet. App. A6).

While not contesting TECA's determination that the DATS letter served to initiate DOE's audit, petitioner argues (Pet. 7-8) that the subpoena is subject to the statement of policy insofar as it covers documents relating to time periods that were not mentioned in the DATS letter. Contrary to the premise of this argument, however, a DATS letter does not define the final scope of the information to be reviewed; rather, it serves to commence the audit of a firm by requesting voluntary production of designated materials. For this reason, as the DATS letter explicitly states (Pet. App. A26), "DOE may after its initial review, need to examine similar data for later periods."

Petitioner also broadly asserts (Pet. 8-15) that DOE is bound by its statement of policy and that any agency actions inconsistent with this statement are null and void. The statement of policy rests upon the Department's "responsibility to allocate its own resources to those audit areas having the greatest enforcement potential" (43 Fed. Reg. 27779 (1978)) and its view of the "appropriate[ness,] as a matter of prosecutorial discretion, to impose upon itself such a limitation * * * " (*id.* at 27780). Whatever the merits of petitioner's assertion in these circumstances, the question it seeks to raise is not presented in this case because, as TECA held, the subpoena to petitioner is outside the terms of DOE's statement of policy. Moreover, even if the statement of policy were applicable, the DOE Office of Hearings and Appeals correctly determined that the subpoena here falls within the specific provision allowing an audit to be commenced after June 30, 1978, "where there are 'credible

indications of significant violations' " (Pet. App. A15).[2] Thus, there is no occasion for the Court to address petitioner's contention in this case.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

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[2]TECA found it unnecessary to pass upon this issue in view of its determination that the statement of policy did not preclude issuance of the subpoena in the first instance. Furthermore, and notwithstanding petitioner's suggestion to the contrary (Pet. 13-14, n.1), an agency's interpretation of its own rules and policies is entitled to considerable deference by the courts. See, *e.g.*, *Ford Motor Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). Such deference is particularly appropriate where, as in this case, the agency is merely engaged in a preliminary investigation "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if * * * the facts thus discovered should justify doing so." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 201 (1946).

[3]We also wish to inform the Court that TECA issued its mandate on November 24, 1980, thereby allowing the audit to proceed after being delayed for two years. Thereafter, petitioner applied to TECA for a stay. Treating this application as a motion to recall the mandate, TECA denied petitioner's request on December 12, 1980. We are advised that DOE's inspection of petitioner's records commenced on January 12, 1981, and that the audit is expected to be completed in the next several months.